



March 14, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25;
*AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange
Carrier Rates for Interstate Special Access Services*, RM-10593; *Technology Transitions*,
GN Docket No. 13-5; *Investigation of Certain Price Cap Local Exchange Carrier
Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247

Dear Ms. Dortch:

In accordance with the Modified Protective Order, Second Protective Orders, Data Collection Protective Order, and Tariff Investigation Protective Order for the above-referenced proceedings, Windstream Services, LLC ("Windstream") herein submits a redacted version of the attached ex parte filing in the above-referenced proceedings.

Windstream has designated for highly confidential and confidential treatment the marked portions of the attached documents pursuant to the Modified Protective Order,¹ Second Protective Order,² and Data Collection Protective Order³ in WC Docket No. 05-25 and RM-

¹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Modified Protective Order, DA 10-2075, 25 FCC Rcd. 15,168 (Wireline Comp. Bur. 2010).

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, DA 10-2419, 25 FCC Rcd. 17,725 (Wireline Comp. Bur. 2010).

³ *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Data Collection Protective Order, DA 14-1424, 30 FCC Rcd. 11,657 (Wireline Comp. Bur. 2015).

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10593, the Tariff Investigation Protective Order in WC Docket No. 15-247,⁴ and the Second Protective Order in GN Docket No. 13-5.⁵

Pursuant to the protective orders and additional instructions from Commission staff, Windstream is filing a redacted version of the document electronically via ECFS, one copy of the Highly Confidential version with the Secretary, and sending two copies of the Highly Confidential version to both Christopher Koves and Marvin Sacks, Pricing Policy Division, Wireline Competition Bureau.

Please contact me if you have any questions or require any additional information.

Sincerely,



John T. Nakahata
Counsel to Windstream

Attachment

cc:

Madeleine Findley	Virginia Metallo
Eric Ralph	Thom Parisi
Deena Shetler	Joseph Price
Pamela Arluk	Peter Saharko
Daniel Kahn	Christine Sandquist
William Kehoe	David Zesiger
Christopher Koves	

⁴ Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Order and Protective Orders, DA 15-1387 (Wireline Comp. Bur 2015).

⁵ *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket Nos. 13-5 and 12-353, Second Protective Order, DA 14-273, 29 FCC Rcd. 2022 (Wireline Comp. Bur 2014).



March 14, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Technology Transitions*, GN Docket No. 13-5; *Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter the Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3)*, WC Docket No. 15-1; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247

Dear Ms. Dortch:

On March 10, 2016 Jennie Chandra and Malena Barzilai of Windstream Services, LLC (“Windstream”) and John Nakahata and Henry Shi of Harris, Wiltshire, & Grannis LLP, counsel to Windstream, met with Madeleine Findley, Daniel Kahn, and Peter Saharko, all of the Wireline Competition Bureau; and separately with Eric Ralph (by telephone), Deena Shetler (by telephone), Pamela Arluk, William Kehoe, Christopher Koves, Virginia Metallo, Thom Parisi, Joseph Price, Christine Sandquist, and David Zesiger of the Wireline Competition Bureau regarding the above-referenced proceedings.

I. The Commission Should Grant Windstream’s Petition to Confirm the Continued Availability of Unbundled DS1 and DS3 Capacity Loops.

In the meeting with Ms. Findley and Messrs. Kahn and Saharko, Windstream urged the Commission to grant Windstream’s declaratory ruling petition in order to help ensure that the current competition options available to small business, government, and nonprofit customers of dedicated services will be unaffected by a change in transmission protocol from TDM to IP or by the use of fiber.¹ We noted that we had raised this issue in Docket No. 05-25 as well, as it interrelates with and is an important part of maintaining just and reasonable rates for last-mile

¹ See Petition for Declaratory Ruling of Windstream Corporation, GN Docket No. 13-5 (filed Dec. 29, 2014) (“Windstream Petition”).

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connections, including for dedicated business data services. As Windstream had highlighted when it filed its petition, the availability of unbundled DS1 and DS3 capacity loops was a foundational premise and justification for the Commission's prior grants of forbearance with respect to specified packet-based services.² The time is ripe for the Commission to act on disputes regarding these loops. Over the past year, commenters have poured into the record factual information and legal analyses in support of Windstream's petition,³ and opponents have not identified any unaddressed issues that would prevent the Commission from promptly reaching a resolution.

Several state public utilities commissions have recently asked the Commission to grant Windstream's petition. These filings add further support to the legal basis for Windstream's petition, and also emphasize the importance of unbundled DS1 and DS3 capacity loops to competition in their communities.⁴ Windstream shares the concern expressed by the state

² See *id.* at 18-19.

³ See, e.g., Comments of Public Knowledge *et al.* at 16, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015); Comments of XO Communications on the Tech Transitions Notice of Proposed Rulemaking and on the Petition for Declaratory Ruling of Windstream at 27-28, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015); Comments of the Ad Hoc Telecommunications Users Committee at 20-21, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015); Comments of COMPTTEL at 37-39, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015); Comments of Birch, Integra, and Level 3 at 39-40, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593 (filed Feb. 5, 2015); Joint Comments of Grande Communications Networks LLC and U.S. TelePacific Corp. at 2-4, WC Docket No. 15-1, GN Docket No. 13-5 (filed Feb. 5, 2015); Comments of Granite Telecommunications, LLC Supporting Windstream's Petition for Declaratory Ruling at 2-3, WC Docket No. 15-1, GN Docket No. 13-5 (filed Feb. 5, 2015); Comments of the Pennsylvania Public Utility Commission at 3, WC Docket No. 15-1, GN Docket No. 13-5 (filed Feb. 5, 2015); Reply Comments of the Vermont Public Service Board & Vermont Public Service Department at 2-3, WC Docket NO. 15-1, GN Docket No. 13-5 (filed Feb. 27, 2015); Comments of NTCA—The Rural Broadband Association at 4 n.3, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593 (filed Feb. 5, 2015).

⁴ See Letter from James Volz, Chairman, et al., Vermont Public Service Board, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Mar. 3, 2016) ("Vermont PSB Ex Parte"); Letter from Crystal Rhoades, Commissioner, et al., Nebraska Public Service Commission, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 15-1 (filed Feb. 23, 2016); Letter from Steven V. King, Executive Director and Secretary, Washington

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commissions about the impact of the ILECs' elimination of DS1 and DS3 capacity loops on small business and government customers.⁵ Many of these types of customers, such as the University of Arkansas Medical Center, require the performance of dedicated services at many locations, and are able to redirect the cost savings made possible through competitive offerings toward further investments in fulfilling their public service missions.⁶

Filings in the business data services proceeding further confirm that DS1 and DS3 capacity loops continue to play a critical role in fostering competition for lower-bandwidth dedicated services customers who otherwise would have the ILEC as the sole Ethernet provider.

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[REDACTED] ***END HIGHLY CONFIDENTIAL***⁷ We also noted that the record in Docket No. 05-25 confirms the continued significance of these unbundled loops in providing competitive choice and imposing some discipline on special access prices.⁸

Utilities and Transportation Commission, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket No. 15-1 (filed Feb. 11, 2016) ("Washington UTC Ex Parte"); David E. Screven, Assistant Counsel, Pennsylvania Public Utilities Commission, at 1-2, WC Docket No. 15-1 (filed Mar. 11, 2016).

⁵ See Vermont PSB Ex Parte at 1; Washington UTC Ex Parte at 2.

⁶ See Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, at 1, GN Docket No. 13-5, WC Docket No. 15-1 (filed June 18, 2015).

⁷ Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith ¶ 64 ("Windstream Declaration"), attached as Attach. A to Comments of Windstream Services LLC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 ("Windstream Dedicated Services Comments").

⁸ See Windstream Dedicated Services Comments at 77-79; Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 44 n.42, ¶ 37, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) ("Baker Declaration") (finding that

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Likewise, responses in the tariff investigation underscore the continued importance of unbundled DS1 and DS3 capacity loops to competition. In its direct case, AT&T states that it continues to lease “hundreds of thousands” of UNE loops to competitive providers,⁹ and attempts to minimize the importance of issues related to DS1 special access commitments by citing statistics for its DS1 sales under tariff pricing plans relative to sales of all “special access services,” apparently including all forms of UNEs.¹⁰ This discussion is intended to support AT&T’s position that additional regulation of TDM special access commitments is unwarranted. However, Windstream and other competitors cannot replace all current TDM special access purchases with UNEs,¹¹ and as the Commission has recognized, unbundled DS1 and DS3 capacity loops when available supplement, but do not replace, special access services as a market-opening tool.¹² Instead, these statistics are best viewed as evidence showing the continued importance of UNEs in the marketplace, and the harm that would follow from the unilateral ILEC elimination of UNEs in the technology transitions.

The Commission’s completion of its review of competition in the business data services market, in both the rulemaking and tariff investigation, presents an appropriate and fitting opportunity to resolve the issue raised in Windstream’s petition. The Commission should seize this opportunity because uncertainty about the availability of unbundled DS1 and DS3 capacity loops in the near future hinders competitive providers’ ability to offer multi-year dedicated services agreements to business customers today.¹³ Competitive carriers are bidding today on services they will provide several years from now, and the uncertainty harms competitors’ ability

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⁹ Brief of AT&T Inc. in Support of Its Direct Case at 13, WC Docket No. 15-247 (filed Jan. 8, 2016) (“AT&T Direct Case”).

¹⁰ See *id.* at 14-15.

¹¹ Based on price, Windstream prefers to use UNEs whenever possible to serve customers at lower bandwidth levels but regulatory, contractual, and technical constraints prevent it from doing so in many cases. Windstream Declaration ¶¶ 56-59.

¹² See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533, 2570-71 ¶ 63 (2005) (finding that without UNEs there would be “an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors’ wholesale inputs to prevent competition in the downstream retail market”).

¹³ See Windstream Petition at 2 (noting that because small and medium-sized enterprises generally purchase services under multiyear (often three- to five-year term) contracts, CLECs today must bid on services that they will be providing three to five years from now).

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to ensure they can control the quality and attributes of the services they provide and to offer the lowest possible prices.¹⁴ The ultimate result of these conditions will be less choice and higher prices for business, government, and nonprofit customers.

II. The Commission Has Multiple Remedial Approaches Available to Address the Lack of Competition in the Dedicated Services Markets.

In the meeting with Ms. Shetler, et al., Windstream brought the Commission's attention to additional industry data that reaffirm the ILECs' market power over dedicated services and the resulting supracompetitive prices that competitive providers—and ultimately customers—have to pay. Windstream also discussed how discriminatory ILEC pricing conditions on the resale of telecommunications services are plainly covered by Section 251(b)(1) of the Communications Act of 1934's ("Communications Act") duty on the part of all local exchange carriers "not to impose unreasonable or discriminatory conditions" on the resale of telecommunications services.¹⁵ Windstream reiterated the need for Commission action to remove terms and conditions in ILEC special access tariffs that unreasonably impose penalties on CLECs under volume commitment plans for migrating from TDM to Ethernet with the same ILEC. Finally, Windstream discussed clarifying the Commission's wholesale discount requirements under Section 251(c)(4), which is one of multiple remedies that the Commission should adopt to help constrain ILEC market power.

A. Industry analyst price comparisons have found higher-than-expected wholesale Ethernet prices over time, and indicate that prices vary at the building level based in part on the number of competitors.

First, Windstream highlighted TeleGeography's comparisons over time of per-Mbps wholesale prices for a 50 Mbps Ethernet access circuit and for a DS3 leased line access circuit across four markets, including New York City and several large cities outside of the United States.¹⁶ The comparisons show that, consistently over a year-and-a-half period from January 2014 to June 2015, New York was the only city in which the median per Mbps price for a 50 Mbps Ethernet service was *higher* than the per-Mbps price for a DS3 circuit.¹⁷ The persistence of higher Ethernet costs over time in New York City runs contrary to TeleGeography's global observation that "as Ethernet access continues to replace leased line access globally, customers

¹⁴ *See id.*

¹⁵ 47 U.S.C. § 251(b)(1).

¹⁶ *See Attach. 1.*

¹⁷ *See id* at 1-3.

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transitioning to Ethernet will realize greater cost efficiencies.”¹⁸ With respect to 10 Mbps service, TeleGeography recently found that New York City, also unlike most other cities surveyed, exhibited a median Ethernet price at the high end of its price range—which reflects “a large mass of quotes near the upper end of the [price] range” on the one hand, and “less expensive rates available within pockets of the central business district where multiple players compete at varying levels” on the other hand.¹⁹ A more typical distribution includes a large volume of prices just below the center of the price range, with a few circuits among higher priced groups.²⁰

More generally, TeleGeography, for the year-and-a-half period from January 2014 to June 2015, noted that “the access market [in the United States and Canada] has been slow to transition to Ethernet technology,”²¹ and has “lagged behind other developed regions significantly in Ethernet.”²² TeleGeography concluded that “[t]he U.S. and Canada remained higher priced than should be expected from the network price market” for Ethernet, and that “[r]egulatory regimes and the number of competitors operating within the country matter, and have consequences for aggregate market rates.”²³ TeleGeography added that pricing within a metro area can be attributed, among other elements, to a number building-specific factors like the

¹⁸ TeleGeography, *Local Access Pricing Service, H2 2015 Local Access Market Summary* at 15 (2015) (“TeleGeography H2 2015 Summary”).

¹⁹ TeleGeography H2 2015 Summary at 11. *See also* TeleGeography, *Local Access Pricing Service, H2 2014 Local Access Market Summary* at 2 (2014) (“TeleGeography H2 2014 Summary”) at 9 (noting that “New York posted both a larger range and a higher median” price for 10 Mbps Ethernet as compared to most other surveyed cities).

²⁰ TeleGeography H2 2015 Summary at 10.

²¹ *Id.* at 12.

²² TeleGeography H2 2014 Summary at 2.

²³ TeleGeography H2 2015 Summary at 15. As cited in prior Windstream filings, a prior TeleGeography summary, in particular, showed lower bandwidth Ethernet services were priced higher in the United States and Canada than most other parts of the world. *See* Comments of Windstream Services, LLC at 53, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (filed Jan. 27, 2016) (“Windstream Dedicated Services Comments”) (citing 2014 TeleGeography report showing that “the United States and Canada have some of the highest prices worldwide for 10 Mbps Ethernet, with a median city price of \$1,247, but some of the lowest prices worldwide for DS1s, with a median city price of \$463”); Reply Comments of Windstream Services, LLC, at 17, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1 (filed Mar. 9, 2015) (“The median 10 Mbps price for the rest of the country in the United States and Canada, \$1,466, exceeded that in all regions but East Asia, Central America, and Sub-Saharan Africa.”).

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“number of service providers connected to the customer building,”²⁴ which further supports analyzing competition for dedicated services at the relevant geographic market of the customer's individual building.

B. Section 251(b)(1) prohibits discriminatory pricing conditions on the resale of telecommunications services.

Second, Windstream discussed evidence in the marketplace that large ILECs are discriminating against carrier customers by charging them prices that are greater than the retail prices charged to end-user customers for the same services.²⁵ *****BEGIN HIGHLY**

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*****END HIGHLY CONFIDENTIAL*****²⁶ This practice not only turns the concept of discounts to wholesale customers under Section 251(c)(4) on its head,²⁷ it also violates the duty under Section 251(b)(1) not to impose unreasonable and discriminatory conditions on the resale of telecommunications services.²⁸ Accordingly, the Commission should make clear that all local exchange carriers have the obligation under Section 251(b)(1) to make their telecommunications services available to carrier customers on rate, terms, and conditions that are no worse than those that are available to end-user retail customers.

²⁴ TeleGeography H2 2015 Summary at 1.

²⁵ See Windstream Dedicated Services Comments at 49-51.

²⁶ Windstream Declaration ¶ 95.

²⁷ See 47 U.S.C. § 251(c)(4).

²⁸ See *id.* § 251(b)(1). See also *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, FCC 80-607, 83 FCC 2d 167, 168 ¶ 1 (1980) (“[R]estrictions of any kind on the resale and sharing of domestic public switched network services are unjust, unreasonable, and unreasonably discriminatory, and hence unlawful under Sections 201(b) and 202(a) of the Communications Act.”); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, FCC 76-641, 60 FCC 2d 261, 283-284 ¶¶ 40-41 (1976) (“[W]e conclude that the restrictions on the subscriber’s resale and sharing of communications service are unjust and reasonable under Section 201(b) of the Act The tariff provisions which deny service to resellers and sharers are . . . unlawfully discriminatory under Section 202(a) of the Act.”).

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In its reply comments in the business data services proceeding, CenturyLink erroneously argues that the Commission has concluded that Section 251(b)(1) does not prohibit a LEC from charging its wholesale customers higher prices than its retail customers for the same service. In support of its argument, CenturyLink cites the 1996 *Local Competition Order*, which, in the context of discussing the differences between Sections 251(b)(1) and 251(c)(4), noted “that section 251(b)(1) clearly omits a wholesale pricing requirement.”²⁹ CenturyLink’s quotation from the *Local Competition Order* is highly misleading. In that Order, the Commission merely noted that Section 251(b)(1) does not have a *standalone* wholesale pricing requirement like Section 251(c)(4), which requires wholesale service to be priced *below* retail service.³⁰ This Commission text, however, did not dispute the fact that Section 251(b)(1) prohibits carriers from discriminating against wholesale customers. Indeed, there is nothing in the *Local Competition Order*—or any other Commission precedent—indicating that any LEC may discriminate *against* a wholesale customer by charging the wholesale customer a higher price than a similarly situated retail customer. Section 251(b)(1) by its terms prohibits unreasonable and discriminatory conditions on resale: Discriminatory pricing of telecommunications services to wholesale customers would violate the plain meaning of that requirement.³¹ CenturyLink’s interpretation of Section 251(b)(1) and the *Local Competition Order* would completely nullify that statutory provision: It would allow ILECs to shut down the resale of their telecommunications service by charging a dramatically higher price on a discriminatory basis only to carrier customers seeking to resell the service.

²⁹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499, 15,981 ¶ 976 (1996) (“*Local Competition Order*”). See also Reply Comments of CenturyLink at 76, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016).

³⁰ *Local Competition Order* at 15,981 ¶ 976.

³¹ See *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d at 168 ¶ 1; *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d at 283-284 ¶¶ 40-41. The other precedent cited CenturyLink is even more clear that the Commission’s reference to “wholesale pricing requirement” means specifically the avoided cost discount requirement under Section 251(c)(4). In the *Qwest Omaha Forbearance Order*, the Commission observed that “unlike the section 251(c)(4) resale obligation, section 251(b)(1) has no wholesale pricing requirement,” and that “Qwest has not demonstrated that resale at avoided-cost discount is no longer necessary to competition in the Omaha MSA.” *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd. 19,415, 19,460 ¶ 89 (2005).

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- C. **The Commission should act in both the rulemaking and tariff investigation to remove ILEC terms and conditions in TDM special access tariffs that unreasonably penalize carrier customers for migrating from TDM to Ethernet services with the same ILEC.**

Third, Windstream reiterated that the ILEC practice of imposing punitive shortfall charges for carrier customers migrating from TDM to Ethernet circuits effectively raises rival carriers' costs to provide competitive services. As discussed in Windstream's prior comments and tariff investigation filing, although Verizon's tariff ostensibly provides the ability to migrate from a DS1 or DS3 special access service to Ethernet, such provisions are very narrow and difficult to invoke and implement.³² ***BEGIN HIGHLY CONFIDENTIAL***

END HIGHLY CONFIDENTIAL This leads to a situation under Verizon's NDP whereby even though a CLEC pays rates reflecting the circuit portability option (thus covering any costs related to early terminations and customer changes) and even though a CLEC's total spend on last mile access (including DSn and Ethernet) is increasing—and thus the CLEC is delivering more revenue than was assured through the percentage volume commitment—the CLEC can still be subject to shortfall penalties because the CLEC's volume of DS1 and DS3 circuits is deemed to be too low. This is economically irrational, and only serves the purpose of raising rivals' costs during a time of technology transition. Thus, the Commission should declare unjust and unreasonable existing ILEC special access discount plans' terms and conditions that do not apply carrier customers' Ethernet purchases to meet TDM term-and volume-based discount commitments.

Specifically, Windstream noted that under the Verizon ***BEGIN HIGHLY CONFIDENTIAL***

³² See Windstream Dedicated Services Comments at 58; Opposition of Windstream Services, LLC at 13, WC Docket No. 15-247 (filed Feb. 5, 2016).

³³ ***BEGIN HIGHLY CONFIDENTIAL***

END HIGHLY CONFIDENTIAL See Windstream Declaration ¶ 105. Of course, if Windstream exits the plan early, it will have to purchase its remaining TDM circuits through other arrangements, likely at higher rates.

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If it exits the plan at the earliest possible date, Windstream would be faced with one of three choices if it seeks to continue providing dedicated services in buildings for which Verizon controls the only suitable connection, each of which either increases monthly costs or poses new potential penalties, even as Windstream's Ethernet purchases continue to grow. First, Windstream could enter into a new agreement based on a lower circuit count, but that still presents shortfall penalties as TDM circuits decrease over time. Second, Windstream could commit to terms for individual circuits without portability, but those terms are unlikely to match the terms of the underlying end-user agreements. Third, Windstream could pay significantly higher undiscounted rates for inputs, with which Windstream could not hope to sustain competitive retail rates.³⁵

Terms and conditions that penalize CLECs transitioning to IP are unreasonable because the punitive shortfall charges are disproportionate to the costs likely to be incurred by the ILEC as a result of the transition. Verizon argues in its tariff investigation rebuttal that circuit-portability imposes costs on Verizon, and that it "trades that increased circuit portability" for a

³⁴ See *id.*

³⁵ See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd. 11,417, 11,441-42 ¶ 48 (2015) (citing Level 3's statement that paying ILEC rack rates is "not economically tenable"); Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3 at 15-16, WC Docket No. 15-247 (filed Feb. 5, 2016) ("[U]ndiscounted prices are so high that wholesale customers can rarely pay them and compete in downstream retail markets with the incumbent LEC."); Comments of XO Communications, LLC on ILECs' Direct Cases at 16, WC Docket No. 15-247 (filed Feb. 5, 2016) ("[T]he ILEC monthly rack rates for DSn are so artificially high as to render[] unthinkable a business plan using DSn services purchased at those rates as a wholesale input.").

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customer's commitment to, among other things, maintain a minimum purchase level "*from Verizon*."³⁶ Verizon states that it would lose "the assurance that it will receive a steady stream of revenue" if a customer fails to meet its minimum levels through TDM purchases alone.³⁷ However, counting Ethernet spend toward the minimum levels preserves this assurance: It maintains the "benefit of the bargain" for both seller and purchaser at a time of technology transition. *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

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Verizon further argues that it "has to bear the costs of physically connecting new circuits and disconnecting old ones when customers take advantage of circuit portability."³⁸ These costs, however, are not related to circuit shortfall, but are related to portability, and thus are already priced into the DS1 and DS3 rates paid for portability. Moreover, Verizon itself voluntarily chooses to deploy Ethernet to any given location; if recovery of other costs were really such a concern, Verizon rationally would decline to offer the less profitable service. To the extent Verizon may be arguing that there would be unrecovered costs of establishing the Ethernet circuit, that seems fanciful. First, such an argument assumes that the costs of setting up the Ethernet circuit exceed the costs of establishing the TDM circuit. Second, it assumes that Ethernet recurring and non-recurring charges (including potential early termination fees if all expected monthly payments are not made) are insufficient to recover the costs of the Ethernet circuit over the term applicable to such circuits, which are not governed by the NDP. Third, it ignores the fact that Verizon prices its wholesale Ethernet services at per-Mbps levels above the rates for comparable capacity provisioned by DS1 services. Fourth, it disregards Verizon's own claims elsewhere that provisioning Ethernet over fiber is more efficient than operating legacy technologies over time, and thus can enable higher margins than TDM services.³⁹

Verizon adds that "portability also reduces the time over which Verizon can recover those circuit-specific, non-recurring costs,"⁴⁰ but this cannot justify ignoring Ethernet purchases

³⁶ Rebuttal Case of Verizon at 7, WC Docket No. 15-247 (filed Feb. 26, 2016) (emphasis in original) ("Verizon Rebuttal Case").

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Comments of Verizon at 5-8, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593 (filed Feb. 5, 2015) (stating that fiber offers increased reliability, better performance, and improved energy efficiency).

⁴⁰ Verizon Rebuttal Case at 7.

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when calculating shortfall penalties for TDM circuits that are purchased at rates reflecting portability. Again, the hypothesized decreased time over which Verizon can recover its costs of establishing the TDM circuit are already priced into its DS1 and DS3 rates with portability.

Furthermore, counting the amounts spent on Ethernet circuits toward the minimum commitment levels should not increase an ILEC's absorbed costs in planning and deploying its TDM and IP networks. The TDM network is already in place, and TDM purchases with portability do not establish any expectation of location-based demand. With respect to the IP network, if the ILEC lacks the requisite facilities at any given location to provide a CLEC customer with the Ethernet service input, then the CLEC customer has to purchase either a TDM circuit at that location to fulfill the commitment or an Ethernet circuit located elsewhere. As noted before, neither wholesale nor retail customers possess the ability to force an ILEC to deploy Ethernet service to a location against its will.

Accordingly, there is no reasonable, pro-competitive explanation for the failure to count Ethernet spend toward the attainment of TDM volume commitments; to the contrary, the plain purpose of this restriction is to raise rivals' costs. In place of these unjust and unreasonable terms, the Commission should prescribe that amounts spent on Ethernet circuits provided by the same ILEC count toward meeting minimum aggregate volumes on a dollar-for-dollar basis.⁴¹

For similar reasons, the Commission also should not allow ILECs to apply early termination liability to any individual instance where a TDM special access connection is prematurely disconnected and replaced with Ethernet of at least equal capacity at the same location prior to the end of the previously committed term (or the longest Ethernet term commitment, if it is shorter than the remaining TDM term).⁴² In that case, the ILEC is receiving

⁴¹ Windstream does not face similar volume shortfall penalties in its other significant ILEC agreements. *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *****END HIGHLY**
CONFIDENTIAL***

⁴² Of course, in cases in which the TDM commitment included circuit portability, any Ethernet purchase would be able to substitute for the prematurely disconnected TDM circuit without incurring termination liability.

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at least as much revenue (since Ethernet is priced higher than TDM) over the same overall commitment term.

The Commission has authority pursuant to Section 205 to declare as unjust and unreasonable such terms and conditions in existing ILEC tariffs, and to prescribe just and reasonable terms and conditions in their place.⁴³ Prescribing just and reasonable terms for counting Ethernet purchases toward the discount plan minimum commitments—in a manner more meaningful than current Verizon provisions already purporting to do the same—does not implicate any of the Commission’s prior packet forbearance decisions, because such terms do not affect the terms and conditions under which those Ethernet services are offered.⁴⁴ Moreover, contrary to Verizon’s assertion,⁴⁵ Section 204(a)(3)’s “deemed lawful” provision only precludes retroactive *refunds* of charges based on rates subsequently found to be unlawful, but does not immunize the entire tariff. The Commission has consistently interpreted Section 204(a)(3) to mean that it “by order may prescribe a new rate to be effective prospectively, even if the Commission cannot require a carrier to make refunds.”⁴⁶ The D.C. Circuit did not hold

⁴³ See 47 U.S.C. § 205.

⁴⁴ See CenturyLink’s Petition for Forbearance from Dominant Carrier Regulation and the Computer Inquiry Tariffing Requirement with Respect to its Enterprise Broadband Services Is Granted by Operation of Law, WC Docket No. 14-9, News Release (rel. Mar. 16, 2015); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, FCC 08-168, 23 FCC Rcd. 12,260 (2008); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements and Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, FCC 07-184, 22 FCC Rcd. 19,478 (2007); *Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*; *Petition of BellSouth Corporation for Forbearance 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, Memorandum Opinion and Order, FCC 07-180, 22 FCC Rcd. 18,705 (2007); Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006).

⁴⁵ See Verizon Rebuttal at 23.

⁴⁶ *Implementation of Section 402(b)(1)(A) of Telecommunications Act of 1996*, Order on Reconsideration, FCC 02-242, 17 FCC Rcd. 17,040, 17,403 ¶ 6 (2002). See also *Qwest Commc’ns Corp. v. Farmer & Merchants Mut. Tel. Co.*, 22 FCC Rcd. 17,973, 17,980 ¶ 20 (2007) (“[S]ection 204(a)(3) does not mean that tariff provisions that are deemed lawful

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otherwise in *V.I. Tel. Corp. v. FCC*, in which it concluded that the Commission could “impose its own remedy” prospectively based on a provision of an existing tariff that was subsequently determined to be unlawful.⁴⁷

D. Among other remedies, the Commission should make clear that ILECs must make dedicated services available at an avoided costs discount to the actual retail prices offered.

Finally, in addition to other remedies to constrain ILEC market power with respect to dedicated services, the Commission should clarify that Section 251(c)(4) requires ILECs to offer telecommunications services at wholesale rates that exclude avoided costs. In so doing, the Commission should make clear that the avoided costs must be deducted from the lowest comparable retail rates that are actually paid by retail customers, and not just the published sticker prices for ILEC wholesale services. As Windstream and other competitors have detailed, large ILECs are offering retail rates substantially below wholesale rates, which violates Section 251(b)(1) in addition to 251(c)(4).⁴⁸ In gauging the appropriate size of such an avoided cost discount—for which it would be appropriate for the Commission to exercise its authority under Section 201 to set a default proxy—the Commission could look to, among other things, the amount of the sales agent or channel partner commissions that are avoided in wholesale carrier-to-carrier transactions. ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

END HIGHLY CONFIDENTIAL [REDACTED] The Commission should expect that other providers are likely paying the same or very similar rates, which can serve as an administrable standard to help measure avoided costs. In addition, as Windstream has previously commented, such a discount also should reflect the value and costs avoided in wholesale

when they take effect may not be found unlawful subsequently in section 205 or 208 proceedings.”) (quoting *Implementation of Section 402(b)(1)(A) of Telecommunications Act of 1996*, FCC 97-23, 12 FCC Rcd. 2170, 2183 ¶ 21 (1997)).

⁴⁷ *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 671 n.4 (D.C. Cir. 2006).

⁴⁸ See Windstream Dedicated Services Comments at 50-51; Second Declaration of Matthew J. Loch ¶ 19, attached to Comments of TDS Metrocom, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016).

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arrangements resulting in greater volumes and longer purchase terms,⁴⁹ which produce benefits that the large ILECs tout in their tariff investigation Direct Cases.⁵⁰

As Windstream explained in its comments in the business data services proceeding, the ILECs did not receive forbearance from the application of Section 251(c)(4), and thus the Commission can enforce the requirements of this provision without affecting those earlier decisions.⁵¹ Moreover, because this approach clarifies and interprets existing obligations in the Commission's rules, additional notice-and-comment procedures are not required.⁵²

* * *

⁴⁹ See Windstream Dedicated Services Comments at 74; Reply Comments of Windstream Services, LLC, at 31-33, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (filed Feb. 19, 2016).

⁵⁰ See *id.* at 33-36; Direct Case of Verizon at 12-13, WC Docket No. 15-247 (filed Jan. 8, 2016); AT&T Direct Case at 51 n.159 WC Docket No. 15-247 (filed Jan. 8, 2016) (citing Reply Declaration of Dennis W. Carlton, Allan L. Shampine and Hal S. Sider in Support of AT&T, Inc. ¶¶ 75-83, attached to Reply Comments of AT&T, Inc., WC Docket No. 05-25 (filed Feb. 24, 2010)); CenturyLink White Paper on Discount Plan Terms and Conditions at 33, WC Docket No. 15-247 (filed Jan. 8, 2016).

⁵¹ See Windstream Dedicated Services Comments at 72-73.

⁵² See, e.g., *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("And § 4 [of the Administrative Procedure Act] specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules."); *Sprint Corp. v. FCC*, 315 F.3d 369, (D.C. Cir. 2003) ("A]gencies possess the authority in some instances to clarify or set aside existing rules without issuing a new NPRM and engaging in a new round of notice and comment.").

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Please contact me if you have any questions or require any additional information.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

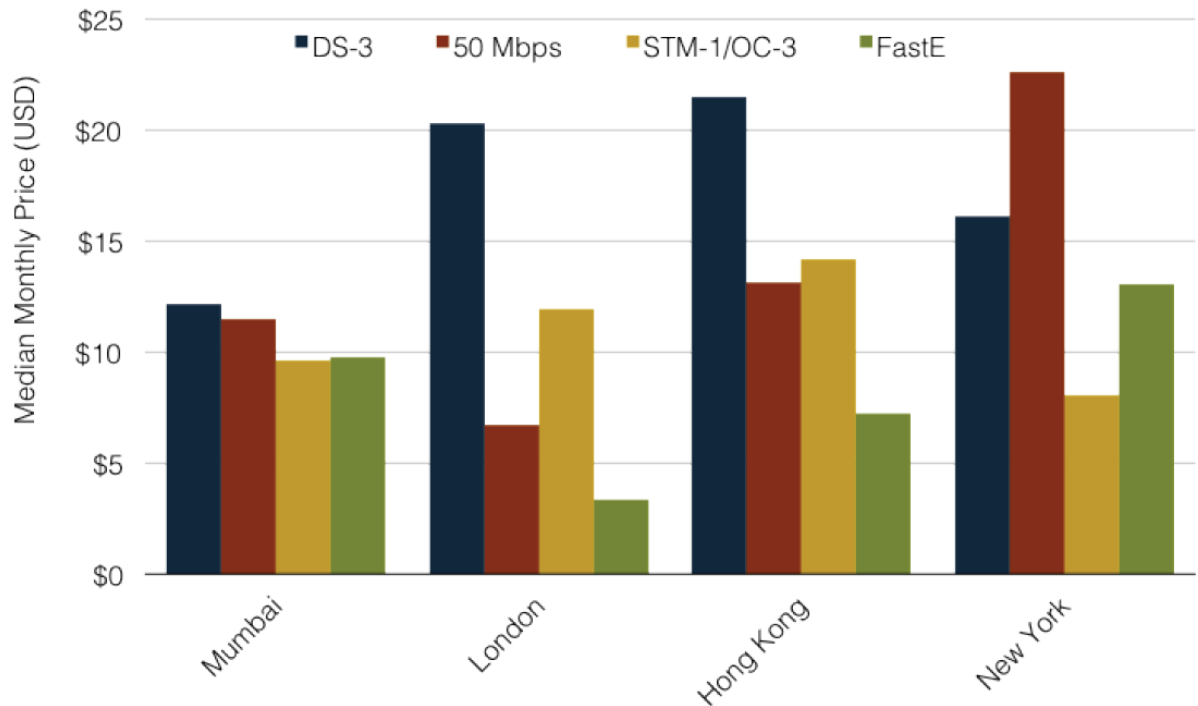
John T. Nakahata
Counsel to Windstream Services, LLC

cc:

Madeleine Findley	Virginia Metallo
Eric Ralph	Thom Parisi
Deena Shetler	Joseph Price
Pamela Arluk	Peter Saharko
Daniel Kahn	Christine Sandquist
William Kehoe	David Zesiger
Christopher Koves	

Attachment 1

Median Price per Mbps for Leased Line and Ethernet in Key Metros, 0-15 km, H1 2014



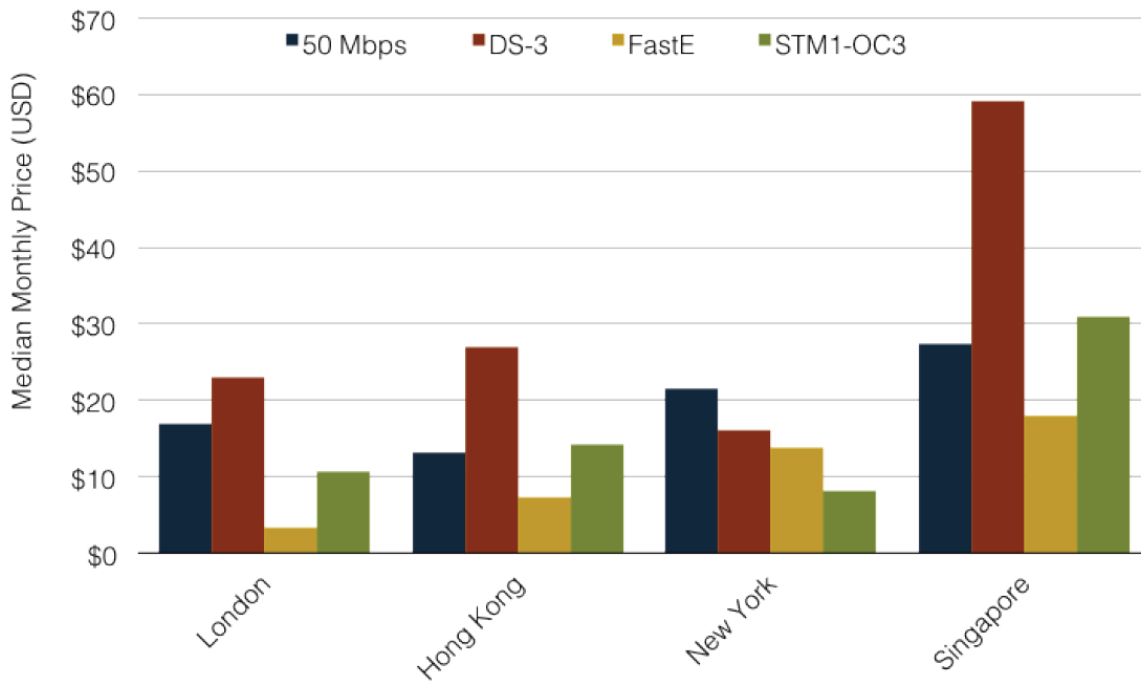
Notes: Each bar represents the median dollar per Mbps for the listed circuit size in the 0-15 km distance band in the listed metro area.

Source: TeleGeography

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TeleGeography, *Local Access Pricing Service, H2 2014 Local Access Market Summary* (2014).

Median Price per Mbps for Leased Line and Ethernet in Key Metros, 0-5 km, H2 2014



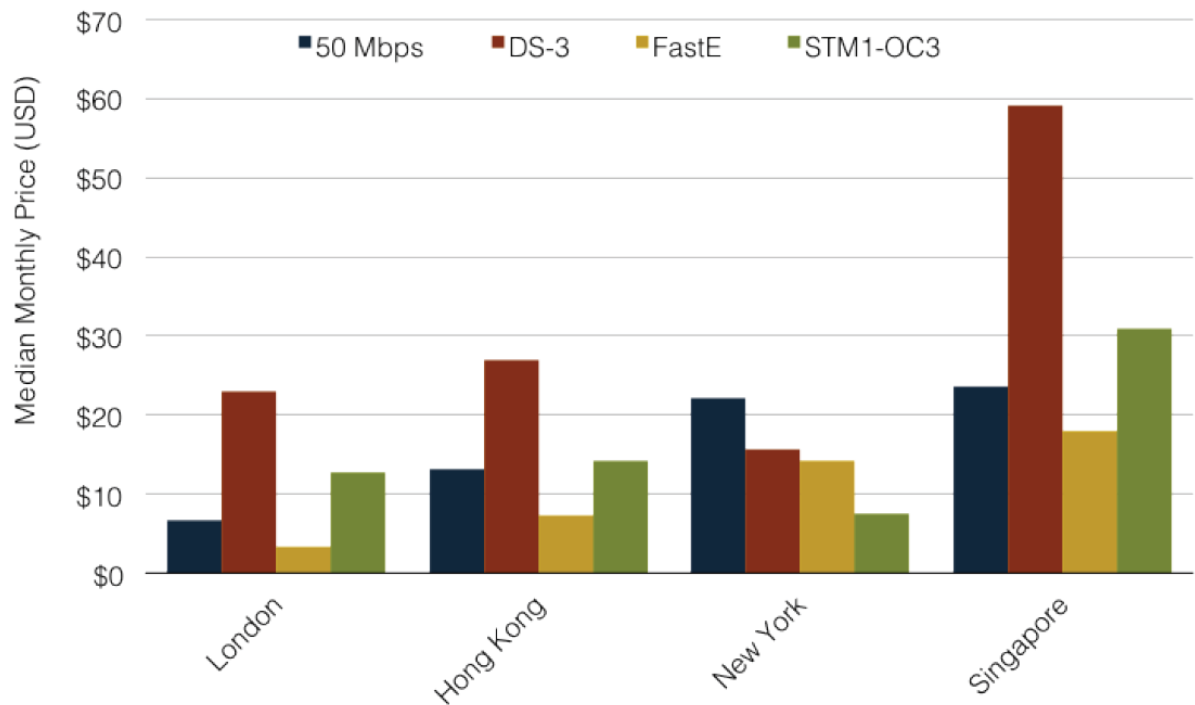
Notes: Each bar represents the median dollar per Mbps for the listed circuit size in the 0-15 km distance band in the listed metro area.

Source: TeleGeography

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TeleGeography, *Local Access Pricing Service, H1 2015 Local Access Market Summary* (2015).

Median Price per Mbps for Leased Line and Ethernet in Key Metros, 0-5 km, H1 2015



Notes: Each bar represents the median dollar per Mbps for the listed circuit size in the 0-5 km distance band in the listed metro area.

Source: TeleGeography

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TeleGeography, *Local Access Pricing Service, H2 2015 Local Access Market Summary* (2015).